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Martti Koskenniemi

Vitoria and Us

Thoughts on Critical Histories of International Law

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Abstract

How to write (international) legal histories that would be true to their protagonists while simultaneously relevant to present audiences? Most of us would also want to write »critically« – that is to say, at least by aiming to avoid Eurocentrism, hagiography and commitment to an altogether old-fashioned view of international law as an instrument of progress. Hence we write today our histories »in context«. But this cannot be all. Framing the relevant »context« is only possible by drawing upon more or less conscious jurisprudential and political preferences. Should attention be focused on academic debates, military power, class structures or assumptions about the longue durée? Such choices determine for us what we think of as relevant »contexts«, and engage us as participants in large conversations about law and power that are not only about what once »was« but also what there will be in the future.

Martti Koskenniemi*

Vitoria and Us

Thoughts on Critical Histories of International Law

»To refuse to think about the ways in which a concept or text from the remote past might be recovered to do new work in the present is to refuse an overt engagement with contemporary politics.« [1]

I. The Historical Turn

The recent, frequently noted increase of interest in the history of international law has no doubt been prompted by contemporary concerns. These are likely to include the need to put into the context of some long-term view the transformation of international law from a narrowly conceived »diplomats' law« into specialized, often technical and economics-driven areas such as trade and investment law, environmental and humanitarian law and the amorphous forms of regulation governing the operations of the international market. The need may have been accentuated by great crises – the use of force in the former Yugoslavia, Iraq and Afghanistan, the »war on terror« and the interminable legalistic debates on the activities of the UN Security Council on »responsibility to protect«. The emergence of regional legal systems in Europe but also in Latin America and Africa has raised questions about whether there is any role for a universal international law in a world that seems both increasingly global and increasingly fragmented. Although academic works integrating new vocabularies of international governance, informal regulation and political legitimacy appear with great frequency, efforts to rethink the field so as to produce new policy-proposals or agendas of structural reform have tended to fall before they fly, proposals for institutional reform turning out stale and uninspiring, part of the very problem they aim to deal with.

If forward vision is occluded, and reform appears more business as usual than inspired search for a better world, the temptation is great to look backwards instead, to try to understand the present by reference to the past. How did we get here in the first place? Hence the recent flood in historical research and publication projects. The *Journal of the History of International Law* is now in its 15th year, the number of volumes in the series by the Frankfurt-based Max-Planck Institute of Legal History on »Studies in the History of International Law« (*Studien zur Geschichte des Völkerrechts*), begun in 2001, has reached 31, and new series of historical works in the English language are commencing at Brill Publishers in the Netherlands and with Oxford University press. A huge *Oxford Handbook of the History of International Law* saw the light of day in 2013. The number of specialized volumes on historical items or persons to have come out in the present millennium in the English, German, French, Italian and Spanish languages is already too large to count. [2] All this activity stands in striking contrast to the relative silence in historical studies in the 1980s and 1990s when most lawyers were busy participating in and commenting on the post-cold war expansion of international law.

The motives behind the new histories vary. Some of them explore the ways in which historical vocabularies such as *ius gentium*, *ius commune* or *lex mercatoria* might be helpful in understanding the present world of post-sovereignty. [3] Others have sought to explain the enormous inequalities of

* Academy Professor, University of Helsinki. The present essay was written for publication in a French version in Saada/Xifarras (forthcoming 2014/15).

1 Orford (2013) 174.

2 A very limited overview appears in Koskenniemi (2013). Compare this with the situation in 2001 when it was possible to report that »The subject of ›history of international law‹ as such no longer exists at law faculties in Germany and many other countries«, Hueck (2001) 199.

3 See Domingo (2010), highlighting the historical pedigree of his suggested new law by exposing its principles in Latin, 3–21, 185–194. See also Waldron (2012).

global wealth today by reference to international law's continuous implication in patterns of colonial domination and exploitation.[4] The historical category of »empire« still has analytical purchase, even if some modification of received theories of dependency and imperial domination might be needed.[5] The controversies have reached even the apparently unhistorical notion of universal human rights.[6] Did such rights exist already in Roman law or should one look instead to the 16th century Spanish theologians or Protestant activists of the 17th century such as Hugo Grotius and Thomas Hobbes?[7] What has been the role of the French *Déclaration des droits de l'homme et du citoyen* (1789)? Or are our present rights perhaps better understood as an offshoot of 1970s cold war strategies or of the effort to construct an ideological foundation to 1990s developments in international institutions?[8] Here, too, postcolonial scholars have insisted on the development of a »geopolitics of knowledge« that would demonstrate the localized and imperial origins of human rights discourses.[9]

II. Into Context

The surge of interest in the history of international law has been fed by political debates about the character and direction of international law today. In itself such interest is not unprecedented. But present histories tend to differ from older works written largely in the mode of classical »intellectual history«, as explorations of perpetual themes extending from the origins of Western political thinking in Greek and Roman antiquity to the present.[10] This was certainly the case with the *Histoire de droit des gens* by François Laurent, professor of history at the University of Ghent, that came out in 18 instalments during 1850–1870. Laurent conceived the history of the law of nations in terms of rules about statehood, war and diplomacy that originated in the ancient Middle East, passed through the »dark ages« and became gradually more complete in the course of the Renaissance, enlightenment and the secularization of European political thought. It was certainly no coincidence that Laurent thought that this European narrative coincided with the »*histoire de l'humanité*«, in accordance with the alternative title page appearing from volume 4 onwards. The work portrayed the law of nations as part of the progress of humanity from separation to unity, led by Europe in thought and in practice, a narrative in which the chain of past centuries would peak in European modernity.[11] Since then, most histories of international law were written as evolutionary narratives about jurists and philosophers carrying out a transhistorical conversation contributing to the ever fuller realization of »great principles«. Perhaps the epitome of this way was Robert Redslob's *Les grands principes de droit international* (1923) that described the development of international law by reference to four great principles – binding force of treaties, the freedom of the state, equality and solidarity. The principles would travel through history as timeless propositions about how to organize the lives of nations, flourishing in some periods, violated in others, providing a universal standard enabling Redslob to measure moments of progress or decline from the perspective of a revolutionary republicanism.[12]

A more recent example of this type of history is provided by Agnès Lejbowicz' *La philosophie de droit international* (1979) that describes the development of international legal reflection in terms of the perennial tension between »humanity« and »sovereignty«, manifested in the writings from Plato and Aristotle through Grotius, Locke, Rousseau, Kant and Hegel to the present. For Lejbowicz, the tension between the two notions provided a timeless standard allowing the evaluation of particular thinkers or periods as more or less inclined towards ideas of a united humanity or notions of identity and selfhood.[13] Many writers have taken sides in favour of the slow coming

4 See especially Anghie (2003), and further e. g. Pahuja (2011).
5 See e. g. Jouannet / Ruiz-Fabri (2007).
6 For a brief overview, see Moyn (2012).
7 This is the view of that most insistent critic of rights-individualism, Michel Villey. See e. g. Villey (1983).
8 For an instant classic, see Moyn (2010). For recent histories of rights, see further Koskenniemi (forthcoming).
9 Barreto (2013) 140, 143.
10 For the classic of this type of history, see Lovejoy (1936).
11 Laurent (1851–1870).
12 Redslob (1923).
13 Lejbowicz (1979).

together of humanity, led by international jurists, thinkers of peace, speculating over the way the laws of interdependence, self-determination, solidarity, economic progress and individual rights have found their place in the today's institutions of global governance. Emmanuelle Jouannet's recent work, for example, traces the development of two strands of legal thinking – one liberal, the other welfarist – from mid-18th century to present projects of law and development in the United Nations and elsewhere. [14]

However, other histories have not viewed international law as a trans-historical conversation over great principles or indeed as a project of global progress. They have instead produced contextual readings of the works and lives of persons in the international law canon. Thus the role of the young Hugo Grotius as a legal counsel of the Dutch East India Company, always a matter of interest for historians, has been regarded as quite central for the interpretation of his work by Martine van Ittersum while Richard Tuck and others have wanted focus on Grotius' Tacitist political views, situating him in the Arminian religious camp. [15] Alberico Gentili has been the object of close contextual readings by Diego Panizza, among others, placing him as a protagonist in the inter-protestant struggles within Oxford University, a member of the English »war party« and supporter of monarchic absolutism. [16] I have treated the »rise of modern international law« through the prism of the activist sensibilities of a group of liberal and protestant jurists in the 1870s while Samuel Moyn has located the rise of human rights in the cold war debates of a century thereafter. [17] Instead of seeking to prove the presence of a historical continuum from the past to the present such studies have sought to localize canonical legal texts in the context of their production and to interpret the activity of particular jurists by reference to what they have wanted to achieve in their professional and political milieus.

It is perhaps above all the person of Francisco Vitoria, a Dominican scholar from Salamanca in the first part of the 16th century, whose role and significance for the history of international law has been the object of the greatest recent interest. In the Spanish-language realm, Vitoria was always known as one of the Catholic clergymen who, with his more famous colleague, Bartolomé de Las Casas, received the title of »defenders of the Indians« owing to their critiques of the violence of Spanish colonization of the Americas. In the debates on the »origins« of international law that emerged in the late-19th century, Vitoria's use of the locution »*ius gentium*« (received through Thomas Aquinas and from older Canon and Roman law) was often highlighted as the starting-point of an international law tradition that would continue through Grotius, Pufendorf, Vattel and the later 19th century public law into the present. [18] But he became truly famous when he was singled out by the US lawyer James Brown Scott in a series of writings and lectures in the 1920s and 1930s on the »Spanish origins of international law«. [19] Scott was an enormously influential player in the interwar international law scene both in the United States and in Europe and the story of his advocacy of Vitoria as the »father« of international was has been many times recounted. [20] Vitoria was an ideal figure to stand at the origin of international law – a man of peace and religion, unlike Grotius heroically turning against the colonial violence of his own countrymen, advocating the peaceful enjoyment of rights of property and sovereignty under the rules of natural law. For 20th century lawyers in Europe and the US, versed in the *leyenda negra* of Spanish colonialism it was deeply satisfying to view oneself in a great humanist tradition inaugurated by a Dominican scholar of Aquinas. Although there was always something uncomfortable about the fact that this tradition was celebrated also by jurists who had little difficulty to work in support of the Franco regime (quite a number of them in fact), the real shock came with Antony Anghie's postcolonial attack on the whole tradition and his indictment of Vitoria as a facilitator of the establishment of the colonial order in the Americas. Although Anghie admitted that Vitoria had been »a brave champion of the rights of Indians in his

14 Jouannet (2011).
15 See Van Ittersum (2006), Tuck (1993) 154–201.
16 See Panizza (1981) and many of the essays in Kingsbury / Straumann (eds.) (2010).
17 Koskenniemi (2002); Moyn (2010).
18 For an early argument to this effect, see Nys (1894). Despite all the criticisms of the search for origins and precurors, it is still quite common, especially among Spanish jurists, to read Vitoria as the »father of international law«. See e. g. Pastor Ridruejo (2012) 79–80.
19 See e. g. Scott (1928).
20 See e. g. Rossi (1998).

time«, he also highlighted that »his work could be read as a particularly insidious justification of their conquest precisely because it is presented in the language of liberality and even equality«.[21]

Anghie's assessment has been widely accepted in the postcolonial literature.[22] But it has also been contested and subjected to especially two kinds of criticisms. One group of scholars have claimed that the assessment is wrong on its merits, that Vitoria's influence was beneficial and helped to curb the worst excesses of colonialism and prepare the ground for the humanitarianism of later international law. Thus Pablo Zapatero argues that whatever the limits of Vitoria's views, he »gave birth to a big idea that many others have, since then, cultivated as a discipline and that has proved to be one of the most useful and now pervasive artefacts of human progress«.[23] Georg Cavallar, for his part, has made a distinction between the protestants Grotius and Vattel as worthy of »debunking … as accomplices of European expansion and colonialism« while viewing Vitoria's »cosmopolitanism … still an impressive feat«.[24] These debates call for a substantive engagement, if not with Vitoria himself at least with the tradition of which he is said to have originated. Did it or did it not become an instrument of European imperialism?[25]

But there is another type of critique that claims that any such engagement is in fact pointless, that we have no way of assessing Vitoria without committing the sin of anachronism and that viewing him as the »origin« of something – of »modern« international law – is a purely ideological move that provides no understanding of Vitoria in the temporal context where he lived and taught. The proper standards on which a historical work should be evaluated must be taken from the period in which that work was produced. Vitoria, for instance, had no idea what would be done in later times with the texts that his students scribbled down while he was teaching. According to the most famous of the contextual historians, Quentin Skinner, the meaning of historical texts ought to be studied by asking the question about what the author of a text or agent *intended to achieve*, by what he or she wrote in view of the linguistic conventions available and the audience to which it was directed. The objective of the process is not so much the real, subjective intent of the actor (which remains hidden) but what the actor may have meant in view of the place and time: »the context itself can thus be used as a sort of court of appeal for assessing the relative plausibility of incompatible ascriptions of intentionality«.[26] From this perspective, attacking Vitoria as a legitimizer of colonialism would mean that »the standards of historiographical analysis have been abandoned«.[27] In a complex and sustained discussion of the matter Ian Hunter has noted that both sides in the controversy over Vitoria's legacy have utilized »a global principle of justice capable of including European and non-European peoples within the ›universal history‹ of [the] unfolding [of *jus gentium*]«.[28] But to view Vitoria through the lenses of a »historical tradition« or to critique him from the perspective of »universal justice« is to neglect the fundamentally local and chronologically delimited sense in which his works and texts ought to be understood. Moreover, and perhaps more importantly, such assessments participate in the very Eurocentrism, they indict by operating with a standard that fails to recognize its own contextual limits: the past, for us, remains a foreign country. In other words, Hunter claims, critiques of Vitoria such as those by Anghie »are themselves European-specific – that is accessible only to those iteratively trained in an array of university-based European intellectual cultures«.[29]

Notwithstanding whether Anghie was actually writing in the name of »universal justice« in this (Eurocentric) mode (which is doubtful), the contextual view poses a real challenge for any effort to write critically about international law's past. There is little disagreement about the merits of reading past jurists against the debates and strug-

21 Anghie (2003) 28. After the phalangist rebellion, the Salamanca-based »Francisco de Vitoria Association« as well as the »Francisco Vitoria Chair« at the University of Salamanca were enlisted to support the Franco regime's anti-communist and ultra-Catholic agenda. See Forcada Barona (2012) 251–252, 255–266. See also Rasilla del Moral (2012b) and Rasilla del Moral (2012a), especially 226–236.

22 Out of the very large literature, see e. g. Thuo Gathii (2010) 31–33; Dassel (2013) 185–190; Nuzzo (2004). Of earlier writers making the point, see Williams (1990) 96–117.

23 Zapatero (2009) 229.

24 Cavallar (2008) 209.

25 I have treated some of the relevant literature in Koskenniemi (2011b).

26 Skinner (2002) 87.

27 Zapatero (2009) 271.

28 Hunter (2010a) 11–12.

29 Hunter (2010a) 13.

gles of the moment where they lived and produced their works. But I do not believe that to submit Vitoria to a postcolonial critique is to commit the same mistake to which earlier hagiographic studies were guilty.[30] In a series of recent essays Anne Orford has observed that strictly chronological compartmentalizations are inappropriate for legal history.[31] I agree with her and in this essay try to expand upon the sense that regardless of the merits of placing historical subjects in their local contexts, *critical* legal history ought not rest content with this; it should not dispose of using materials drawn from other chronological moments, including studies of the *longue durée* and structural determination to assess the meaning and significance of the past. This is not to assume the standpoint of »universal justice« – indeed, Anghie tried precisely to show how the assumption that natural law embodied universal justice erased the Indians' incommensurate world-view and disciplined them by European standards. Hunter himself observes that there are »windows of communication« between world-views and moments widely separated in space and time.[32] I want to expand upon that intuition so as to reassure historians that legitimate critique does not have to accept the standpoint of »universal justice«.

III. Beyond Context

No doubt the turn to context provides an important corrective to ways of doing international legal history. It situates past rules and practices in their institutional, economic and political environments, portraying the jurists and politicians as active agents in their milieus with distinct interests and purposes to advance. It wants to recover the fullness of those agents' voice instead of being interested in it only because it »presents unequivocal signs of modernity«.[33] It brings legal principles down from the conceptual heaven and into a real world where agents make claims and counterclaims, advancing some agendas, opposing others. Meaning cannot be detached from intention, and intention, again, appears in action – in the way words are used to attain effects in the world. Historians of political and legal thought should pay attention to the specific moments when a text was produced and ask the question of who produced it and for what purpose – making agency visible while simultaneously demonstrating the way ideas function within linguistic and social conventions agents must follow so as to attain the persuasive effects they look for.[34] Skinner was not the only one unsatisfied with the way history of ideas had gone about trying to identify the transhistorical essences of political concepts. Reinhart Koselleck and his colleagues in the *Begriffsgeschichte* project in Germany were also arguing that legal and political concepts could not be detached from the experiences and expectations of those who used them: »past social and political conflicts must be interpreted and decoded in terms of their contemporary conceptual boundaries, and the self-understanding on the past of past speakers and writers of their own language-use«.[35] Moreover, Koselleck also made a specific point regarding the »acceleration of time« from early modernity, across what he labelled the »saddle period« (*Sattelzeit*, c. 1750–1850) in which the meaning of key political (and legal) concepts departed from accumulated experience to embody a forward-looking, »progressive« or utopian meaning. The ensuing instability of the semantic fields meant that the historical meaning of words needed to be closely related to the specific temporal moments in which they were used and where the relation between experience and expectation would allow the generation of shared meanings.[36] This, as Matthew Craven recently noted, was also the moment of the rise of a historical consciousness in the profession.[37] From now on, it would be impossible to think of »sovereignty«, say, in the Bodinian manner as a vocabulary that would allow the stabilization of the relations between French Catholics and Protestants so as to enable return to regular monarchic government. When invoked in the late 18th century, that very same »sovereignty« would have become a call for a practically unending

30 I have dealt with the possibility of critique in the absence of universal standpoints in many places, including in Koskenniemi (2005b).

31 See Orford (2013) and Orford (forthcoming).

32 Hunter (2010a) 25.

33 »las enseñanzas de Vitoria presentan signos inequivicos de modernidad«, Pastor Ridruejo (2012) 80.

34 See Skinner (2002) and further e. g. Hamilton-Blakeley (2006) 28–33.

35 Koselleck (1979) 80.

36 See e. g. Koselleck (1979) 75–92 and 155–204 as well as Koselleck (2002).

37 Craven (2013).

change that would allow the nation, to borrow a Wolffian formula, to become constantly more »perfect« in its being. To read international law texts after mid-18th century without attention to the evolutionary and progressive consciousness of the elite classes would be as much a mistake as assuming that when those debates invoke words familiar from earlier periods (such as »sovereignty«, »right«, or *jus gentium*, for example), they would mean the same thing.

But even as contextualism opens a necessary avenue for the examination of past legal and political vocabularies, it is not without its difficulties. In particular, it tends to rely on a »positivist« separation between the past and the present that encourages a historical relativism and ends up suppressing or undermining efforts to find patterns in history that might account for today's experiences of domination and injustice. However, it has long been known that a clear separation between the object of historical research and the researcher's own context cannot be sustained, that the study of history is unavoidably – and fruitfully – conditioned by the historian's prejudices and pre-understandings, conceptual frames and interest of knowledge. The point about the intermingling of the object-vocabulary with the subject's own vocabulary has been often made but there is reason, in view of the contextualist attack on »anachronism«, to remind ourselves once again of the importance for critical study of law and history of the awareness of such intermingling. The answers we receive from historical study are dependent on the questions we pose – those questions, again, being crucially dependent on our present projects, our understandings and pre-understandings. As Hans-Georg Gadamer used to stress »History is only present to us in light of our futurity«.[38] This is precisely what we see when our present problems with »globalization« lead us to examining the past of our inherited legal concepts and institutions.

A first problem with contextualism, well-known to Skinner and Koselleck, but often forgotten by their followers, has to do with delimiting the relevant context. Is it that of writing books on law and lecturing at universities or that of making claims and counterclaims within some diplomatic or military dispute? What role play the institutions and traditions of academic life for the assessment of the contribution of a writer or a jurist for his work and can those institutions be understood without regard to wider histories of the university in Europe, the rise of academic and professional specializations and disciplines and their role in the formation of the modern (European) State? And then there are the large questions raised by Ellen Meiksins Wood at the outset of her recent series of volumes on the history of political thought. Many historians, she complains, appear to concentrate only on the *intellectual* context – the texts produced by the historical agent, his or her relations to colleagues, correspondence and activity within some intellectual or political institution. In all this history, she observes, there is very little

> »… substantive consideration of agriculture, the aristocracy and peasantry, land distribution and tenure, social division of labour, social protest and conflict, population, urbanization, trade, commerce, manufacture, and the burgher class«.[39]

Likewise in the writing of the history of international law, there are large questions to be posed about the cultural, political and economic role of law and lawyers in particular societies that have to do with the shifting position of the systems of knowledge represented by theology, politics, economics, for example. A study of Vitoria must surely take account of the fact that most of his teaching took place as a commentary on the *Summa theologiae* of Thomas Aquinas in the context of teaching young clerics about the management of the sacrament of penance. A proper account of *that* context, again, ought to include some discussion of the dogmatic history of the Catholic church, including above all the relations between Thomism and the »*via nova*« that was taught in Paris during the time of Vitoria's apprenticeship there. But it should also expand to a discussion of the counter-reformation – after all, Vitoria was invited to represent his emperor Charles V at the Council of Trent and only declined owing to reasons of health, to be replaced by his colleague Domingo de Soto. The context must also include the suppression of the *comuneros*

38 Gadamer (1977) 9.
39 Wood (2008) 9.

rebellion in 1519–1521 in Northern Castile that emerged from a complex of political and economic grievances that profoundly shook the political consciousness of the contemporaries and whose lesson was recorded in the strong appeal for social discipline in Vitoria's 1528 *relectio* on civil power. [40] And finally, it would be impossible to leave aside the massive expansion of a commercial culture that followed the importation of silver from Spain's newly acquired colonies and resulted in the transformation of religious and social attitudes in ways that dramatically undermined the binding force of Church doctrine. [41]

Considering all this, it becomes obvious that the »context« in which the contribution of Vitoria should be placed cannot be strictly limited to the chronological moment in which he lived and where his intentions and projects were formed. Large items such as »the rise of capitalism«, »renaissance conscience«, »Reformation«, »the nature of the Habsburg empire« and other aspects of the political, military and financial transformation that are usually summed up as »early modern« are implicated together with contentious hypotheses about the causal relations between such large items, the relative significance of social, cultural and political factors in the determination of contemporary consciousness, including that of Vitoria's. While it is important to put Vitoria »in context«, that is merely a preliminary to the work of determination of what the appropriate context is. There is no a priori reason to think that chronology would provide the decisive standard instead of, say, some *longue durée* assumption about the role of »organic intellectuals« or the relations between religion and state power. What might be relevant for reading Vitoria might be the nature of Spanish imperialism, its effect on Castilian peasantry, events taking place in the German realm (the use of Protestantism to support the independence of territorial polities) or the way easing the prohibition of usury would facilitate the expansion of international commerce by legitimizing long-distance credit operations, for example. [42]

What the right »context« in which Vitoria should be read and understood is, is thus not at all easy to determine. The contexts of religious dogma, social interest, political power, the encounter with a new world are in one way or another relevant as the background against which Vitoria's teachings could be interpreted embody institutional structures and systems of knowledge whose role in producing what we call »history« is subject to controversy over large items of social theory: the way ideas depend on social structure and vice-versa. [43] The historian needs to choose and delimit and in this he or she is necessarily being anachronistic – is necessarily framing Vitoria's world in accordance with today's ideas about what part of the archive is relevant and which is not, and how their relationship ought to be understood. It has become increasingly common to read and understand Hugo Grotius from the perspective of his advocacy work *De jure praedae* (1604–1606) for the Dutch East India Company (*Vereenigde Oostindische Compagnie*, VOC) and thus at the service of the colonial pursuits of his countrymen. [44] But surely this welcome corrective to the old image of the great humanist may also blind us to the significance of his ecumenical projects and writings that manifest his specific religious convictions that, again, cannot be dissociated from his belonging to a cosmopolitan social class that was viewed with suspicion by the country's strictly puritan majority. Theology, politics and economy – and law – all frame the world in which Grotius operated. How to conceive the relations between these contexts is of course subject to ongoing methodological debate. Each of the alternatives provides us with a different »Grotius« and none with any *intrinsic* epistemological priority. It remains for the historian to weigh and to choose. But whatever the choice, it cannot be dissociated from the historian's own context, the priorities that seem persuasive among his or her colleagues.

Framing Vitoria and Grotius as apologists of empire no doubt reflects an emerging postcolonial consciousness in international law. This, again, points to developments I mentioned at the beginning, the sense that international law is undergoing a period of transformation whose nature is not yet clear to us. This is not a first time such a

40 See Vitoria (1991) 10, 32, 34.
41 I have discussed these e. g. in Koskenniemi (2012a).
42 As I suggest in Koskenniemi (2011c).
43 For a useful appeal for intellectual histories to engage with social theory, see Moyn (2014).
44 Alongside van Ittersum (2006), see also Wilson (2008).

moment has arrived. Many of the historical works after the first world war, such as Redslob's abovementioned *Grandes principes* as well as Sir Paul Vinogradoff's work on the »historical types« of international law were written when there was a turn away from »sovereignty« (indicted among the nationalist ideologies that caused the war) and into »collectivist organization« that would bear in the future the flag of legal cosmopolitanism. [45] But while histories of international law published in the aftermath of the war of 1914–1918 were often written as *doctrinal histories*, tracing the origins of legal »modernity« in the increasing institutionalization of the field, works in the aftermath of the Second World war tended in the opposite direction, as *social histories*, describing law as a dependent variable in the rise and fall of great imperial »epochs«, reflecting the political, military and intellectual predominance of the moment's hegemonic power. It is not difficult to understand why the young Wilhelm Grewe, writing in Berlin in 1944 as the Russian forces were approaching, would imagine international legal history in the context of the rise and fall of imperial power and why he would view the 20th century as the epoch of an Anglo-American condominium. [46] It seems equally obvious why the work, translated into English in 2000, should now be the single most widely read account of international legal history. The same reasons no doubt also account for the present interest in Carl Schmitt's *Der Nomos der Erde* (originally published in 1950, English translation in 2006) the origins of which can also be traced to the fall of Germany and the rise on the political horizon what Schmitt called an Anglo-American technical-economic empire. [47] Each moment develops the kind of history that speaks to its concerns highlighting what it holds important as an account of the way the world is. In the contrast between dogmatic and social history, each side has tended towards reductionism, with the predictable outcome that they have become vulnerable to the charges of utopia and apology. A history of international law without attention to the economic and political interests that rules and institutions uphold would be just as insufficient as one that gave no sense of the seriousness of the jurists' internal debates over the correct principles and how to interpret them. The social and the ideal are, however, inextricably intertwined so that in the end, any legal history – including Redslob's and Grewe's – are bound to include both, though in different proportions, but pointing towards some third type that could be called a study of legal ideology, »sensibility« or »consciousness«. [48]

Nobody has written more eloquently of the historian's own situatedness in his or her own period than Michel de Certeau, and of the way in which the visible and invisible »laws of the milieu organize and ›police‹ the [historical] work«. [49] The academy is part of society and if the historians are able to change the course of historical study, create a new emphasis or propose a new interpretation, this is because the historians' own world has changed. De Certeau gives the example of Lucien Febvre's sidelining of religious factors in an explanation of the crisis of French society in the 16th century. This emerged from the fact that France itself was no longer a religious society and »religion« was not held as an important factor determining the course of history. One can say precisely the same about the way contemporary studies of Vitoria, Suárez, Grotius and Locke, for example, men who lived in profoundly religious societies and confessed to deeply religious world-views, have by and large completely erased the significance of religion as the proper context in which to read their works. Such a choice reflects a mentality that is prevalent in the historian's context, not in the context of the historical object. Let me quote de Certeau:

> »Such is the double function of the place. It makes possible certain researches through the fact of common conjectures and problematics. But it makes others impossible; it excludes from discourse what is its basis at a given moment; it plays the role of a censor with respect to current – social, economic political – postulates of analysis.« [50]

45 Vinogradoff (1923) 69.

46 See Grewe (2000). The »epochal account« has been followed also in Ziegler (1994). I have critiqued Grewe's book in book reviews in *International and Comparative Law Quarterly* 51 (2002) 496–501 and *Kritische Justiz* (2002) 277–281.

47 Schmitt (1950).

48 See Bandeira Galindo (2012) 95–98.

49 Certeau (1988) 63.

50 Certeau (1988) 68.

The establishment and the organization of the contextual archive, as well as the interpretation of the materials are key parts of the historian's work that reflect sensibilities and concerns that are proper to the historian and that no-one else can deal with. What gets included and what remains outside, choices that are important part of the study of international law, for example, cannot be dictated by the past or the »context« – for those choices lay out what the proper «context« is in the first place.

There are innumerable ways in which the context may be chosen and delimited. These cannot be determined by the context itself because they precisely determine what can bee seen in it. Imagination, evaluation and choice are needed, a sense of what is interesting or relevant *today* and what is not. A context is such only against a larger background that makes it visible and shows its boundaries. Or as de Certeau has it, there is a sense in which history (unlike sociology) is always the history of a *significant deviation*, emerging from the monotonous routine against which it appears in its singularity and thus provides a limiting condition. [51] That focus on the singular and the small-scale is also why contextualism often creates better narratives than histories about »great principles and timeless conversations«. There is moreover something to be said about the modesty of its claims when compared to those of that older mode, its effort at sympathetic identification with its protagonists in accordance with that most important preliminary of political critique, the principle of charity – taking the position of one's interlocutor or subject at its strongest terms, perhaps even stronger than that subject had ever imagined. When applied to historical figures such as Vitoria, for example, this means commitment to framing him as in good faith trying to achieve the best result in a difficult circumstance. And yet this is (only) a political choice on a par with the strategy to depict him as a mischievous apologist of power. In each case, however, the historian's construction is precisely that – a construction, not the image of the »real« Vitoria but the historically significant »Vitoria in context«, fully indebted to the historian's interest of knowledge and whatever (critical) point the historian wants to make.

But it is not only that contextualism cannot be fully realized because the past moment that is supposed to provide the meaning-generating datum cannot be isolated from the present context in which the historian works. More importantly, the very premise that it could or should involves a troubling, ultimately uncritical relativism. Full-fledged contextualism argues that the meaning of a past text or event must be isolated in the context where it was written or where it took place. The works of Grotius, for example, can *only* be understood if situated in communication with concerns, »projects« or events that are contemporaneous with him. Focus is on the actual or possible *intentions* Grotius may have had. There are many good objections to thinking about history in terms of the intentions of individual agents. What about the determination of (subjective) intent by the (objective) psychological, social, economic forces in which the subject is situated? Where did the agent / structure problem go? Although the intentions of agents must remain an important part of the study of meaning, they cannot form be the sole, even less the »ultimate« basis on which agents should be understood. The linguistic context and the social conventions that allow agents to generate meaning and others to understand that meaning (and to be persuaded by it) must also be taken account of. [52] It may be the case that Vattel's *Droit des gens* embodied no »philosophical synthesis« or theory of statehood but only manifested his effort to create a »diplomatic casuistry« on the basis of well-known 18th century practices. [53] Yet it is surely important to know whether his readers then or later – some of them at influential positions – read such syntheses or theories into his work. Of all students of history, lawyers are surely best placed to understand the limitations of purely intention-based accounts of past texts or events. To the retort that the question is not at all about *real* but *constructive* intentions, ones the agent might have had, taking into account all we know from the context, the response can surely only be that this

51 Certeau (1988) 83–86.

52 This is of course a very large question. For a discussion, see e. g. Bevir (1999) 31–77.

53 As suggested in Hunter (2010b). The essay is welcome in highlighting the anti-theoretical, casuistic nature of the book. This surely at least in part accounts for its fame. Yet, it is at least as significant that the book has been read and used as a key work in the »18th century natural law tradition«.

supposes that we already *know* the context independently of those intentions. The hermeneutic circle that points from (subjective) intentions to (objective) structures and back again is well-known to theorists of customary law and no more needs to be said about it than that past intentions will always remain opaque to present historians and the methods whereby intent is attributed to agents re-surface all the problems of historical methodology that have to do with isolating and interpreting the meaning of a »context«.[54]

But even if intention has to remain an important datum about the history of legal and political thought, there is no reason to situate it in a chronological context that is hermetically sealed from earlier and later periods. There are, it is well-known, two ways of thinking about the past – as isolated temporal and spatial contexts separate from each other and as a process of constant change in which contexts flow into each other – the difference between Walter Benjamin's »punctual time« and »differential time«.[55] The two perspectives are not exclusive but complementary. While the former allows sharp and detailed examinations of moments in which historical agents communicate with each other, influencing and being influenced by the structures around them, it also freezes the context in time, allowing no sense of their constant becoming and changing, their ultimately turning into other contexts. A large part of interest in legal history, like other history, has to do with accounting for the way in which periods are porous – there are »windows of communication« between them, to use Hunter's expression. An account of Abbé de Mably's *Droit public de l'Europe* should surely take account of his republican orientations received from his readings of Cicero and Machiavelli and his having imbibed influences from Roman antiquity that likewise inspired Montesquieu, Voltaire, Gibbon and Hume.[56] The turn to thinking of the balance of power in mid-eighteenth century as a *legal* principle among writers such as Gundling or Vattel would be inconceivable if one failed to appreciate their admiration of Guiccardini's account of the history of Northern Italy or the efforts, under way at German universities since the mid-17th century, to create a non-Aristotelian public law and statecraft.[57] The meanings of the notion of »state« so central to the history of international law have been in constant change since the time it demarked the personal »status« of the ruler or an estate to indicating territorial units separate from both. While the history of the notion of »state« must be contextual to the extent that it shows the very great distance between the use of that term in, say, Machiavelli and Vattel, it must also look beyond the specific context so as to grasp the development of political and economic organization in Europe between the 16th and 18th centuries.[58] It is only once the changing meanings of »state« are seen to articulate and push towards transformations in ideas about public power that the legal history of statehood has done its work; it is only then that we seize its contingent and changing character also in our present context – for example, that it may not only be a potential rights-violator but also a rights-protector so that a policy of, say, »anti-statism« may be a good choice in some moments but disastrous in others.

Which leads me to the most serious problem about full-scale contextualism – namely its relativist and anti-critical nature. There is, I have already noted, no way back to »great principles and timeless conversations«. The history of »universal human rights« for example, cannot be about the passage of some notion of individual entitlement unchanged and self-identical across time. The study of political and legal ideas must examine the context where such ideas originate and produce effects. But there is no reason to limit the interpretative contexts chronologically.[59] If the determination of the context is always a function of present concerns and preferences, then it is easy to see that postcolonial history has chosen as its preferred interpretative frame the centuries-long domination by Europe of much of the non-European world. Disagreement with postcolonial history is not about »method« at all. Anghie is just as contextual as his critics – though the context (European colonialism) is different from that chosen by the latter (16th century Spain). The differ-

54 See e. g. Koskenniemi (2005a) 388–473.

55 Benjamin (1968) 253–264. For a recent discussion, Gordon (2014).

56 See Kent-Wright (1997).

57 See Gundling (1757); Vattel (2008 [1758]), Part III § 44–50 (492–500).

58 The best account of this history I have been able to find is Lazzeri (1995).

59 Orford (2013).

ence emanates from their political preferences, in what they see as significant in the world and what not. The accusation of false universalism is just as correct or just as misguided in both regards. Chakrabarty is right in pointing out that even the standards of historiography, including debates over methodology, tend to be Eurocentric.[60] But as all writing is writing within some context and tradition, that in itself is no scandal. The important point has to do with consciousness about the power of tradition, there being no non-contextual context, no »view from nowhere«. And yet, some positions are better, more persuasive than others. Full-scale contextualism is a historicism insisting on the separation of chronologically distant moments from each other and the illegitimacy of producing judgments across contextual boundaries. It isolates past moments from today's political discussions and thus – perversely – may lead into two opposite results. On the one hand, it may come to shield past ideas from criticisms that always appear a methodologically suspect »presentism«. Or alternatively, it may exclude those ideas as legitimate participants in today's debates because their origins are in a past that for one reason or another is rejected as politically unacceptable. In each case, open political engagement is avoided under the guise of a methodological point. The result is political through and through.

IV. Legal History – Anachronistic, Teleological and Sometimes Critical

Contextualism is no more able to avoid »anachronism« than it is able to avoid teleology. This is specifically true of the history of *legal* concepts and institutions. As Philip Allott has written, »[t]he legal relations which law creates are the resultants, the actualized outcomes, of past states of the social process. They are the potential content of future social process.«[61] International law is »a bridge between the social past and the social future through the social present«.[62] Such aphorisms really say little more than that law is a normative discipline that builds on the collective experience of the society embodying a plan for the future that goes beyond mere repetition of the past. Law is not sociology and legal history cannot be mere social history in the realist stereotype of the eternal recurrence of the rise and fall of imperial »epochs« without ceasing to be about *law*. An account of law without a teleological, forward-looking mode would fail even as an expression of law's contextual meaning which lies precisely, to borrow Koselleck, in the distinction between experience and the horizon of expectation, or »futures past«.[63] Therefore, any history of international law will also have to be about its imagined futures. Moreover, the construction of the context, I have argued, is crucially dependent on what we now think international law »is« – its being today embodying likewise an account of what it is *for*. In this sense, without necessarily being Marxists, historians of international law must accept that the validity of our histories lies not in their correspondence with »facts« or »coherence« with what we otherwise know about a »context«, but how they contribute to emancipation today. This is not say that historiography should turn into propaganda, only that an understanding of a society – including our own – includes the perspective of its imagined future. A narration always includes a frame and a series of choices about the scope and scale of the subject that are part of the effort to understand the past in light of present concerns. It is to these that I will turn at the end of this essay.[64]

The *frame* of legal histories arises less from conscious choice than is presumed by the historian's contemporaneous context. This includes the most general aspects of logical, causal or psychological relationship that a narrative invokes for its persuasive power. Units of analysis are linked together to form narratives of sequence, entailment, superiority or subordination. A history of the law of the sea or, say, of the territorial belt, may be conceived by connecting conceptual structures of *jus gentium* to the writings of men like Vazquéz de Menchaca or Hugo Grotius while depicting the latter again as agents in some larger structure of imperial or commercial power. Or the frame may be provided by the clash between the changing

60 Chakrabarty (2000).
61 Allott (1990) 111.
62 Allott (2002) 317.
63 I have discussed the role of teleology in law in Koskenniemi (2012b).
64 I have been partly inspired here by Tomlins (2012).

practices of sea powers with the security needs of territorial states, advances in technologies of sailing or the performance of guns on the shore. The right to control the adjacent sea belt evokes the idea of territorial sovereignty that relates in complex ways to processes of state-formation, fisheries practices, the growth of trade and maritime warfare. Most such items would appear in any professional history of the maritime belt but their organization depends on a larger frame that may evoke the »internal« logic of legal institutions, for example, or the »external« forces of economic interest, state power or military technology. The role of ideas of providence and sinfulness that were once parts of the frame has been taken over by »progress« and »development« as aspects of a social theory implied in any such history.

The frame is the condition of the intelligibility of our histories. Even for a contextual historian, it provides the background against which something may appear as a relevant »context« in the first place. To write about Dominican scholars at the university of Salamanca in the 16th century as somehow relevant – perhaps even most relevant – for understanding the actions of powerful agents in the new world is to imagine the law as largely detached from the »guns and germs and steel« or perhaps even *opposed* to those more mundane aspects of the *conquesta*, in contrast to the ultra-realistic accounts by Grewe and Schmitt, or for the German-born Arthur Nussbaum's sceptical post-war history in which the Dominicans appear only as evidence of the »deflecting influence of ideologies and hope«. [65]

The question of *scope* is related to the frame at a lower level of abstraction. Writing a history of international law requires a delimitation of the scope of *that* subject from its surrounding world. It cannot avoid entanglement in jurisprudential debate. Is law »rules« or »practices«, an affair of ideas or facts? The relation between Redslob and Grewe embodies precisely that sort of dogmatic opposition. Should a history of international law be a history of rules and doctrines – or rather of diplomacy and war? A history of territorial regulations looks very different from a discussion of sea power and security needs. Most accounts would likely contain elements of both – though which way the narrative leans will tell much about the futures imagined both by past subjects and contemporary historians.

Are Roman litigation practices about *jus gentium* or the discussion of Christian virtue in Aquinas' *secunda secundae* part of what we today think of as »international law«? What about the development of maritime technologies or military logistics? Different answers may be and have been given, and the results point in different conclusions. In any account of »law«, the delimitation of that set of concepts from the adjoining one of »politics« seems extremely important – the very point of law is to be something »other« than (mere) politics. [66] Is the government of German territorial states in the 18th century part of the history of international law? At the universities of Halle and Göttingen, a group of historically oriented jurists, occupants of chairs of public law or of the law of nature and of nations, renewed the study of what later would be called »political science«. They had studied Tacitus, Machiavelli and Grotius and been impressed by the writings of Hobbes and Conring. [67] Using the naturalist idiom they developed a theory of statehood and divided it into public law on the one hand, and something they called *Staatsklugheit* on the other. Many of them followed Christian Thomasius to further divide the approaches to statehood into three: *justum*, *honestum* and *decorum*. [68] The first they associated with enforceable positive law, the second with the »internal« commands (of conscience) that were not amenable for enforcement and the third with the guidelines that historical insight produced as useful maxims of statecraft. But they were unsure of the place of *jus gentium* in this scheme. Thomasius himself relegated it to »*decorum*« while his followers often regarded it as a utilitarian form of natural law. [69] None of them had much to say about the laws of war and peace, treaty-making or diplomatic protocol that would have been different from what they said about wise statecraft. And yet they now seem hugely significant for the delineation of the academic fields of politics, social science, public law and economics within which also »international law« would come to have a

65 Nussbaum (1954).
66 I have discussed this delimitation extensively in Koskenniemi (2005a).
67 See Hammerstein (1972).
68 Thomasius (1718) Bk I Ch VI § 24–43 (173–177).
69 For the latter position, see Gundling (1747) § 69–73 (35).

specific, though limited place. Although the formation of the present world of disciplinary specializations and hierarchies is not strictly speaking a narrative within the »history of international law«, its effects on the latter are so great and obvious that it is hard to understand the latter without some sense of the former. This is an incident of the larger point that a context is formed through limiting manoeuvres that cannot be regarded as part of the context itself even as they are responsible for its formation. Here the »scope« of international legal history must perforce venture beyond its already-formed context so as to attain genealogical force.

The political effect of delimiting the scope of international law becomes visible once we note that the reflections of seasoned practitioners of diplomacy such as François de Callières or Jean de Wiquefort routinely pass over into the history of the law of nations, thus erasing the boundary between international law and maxims of state policy. By contrast, the works of theorists of economic statecraft such as Charles Davenant or Johann Gottlob Justi do so almost never, thus reinforcing the marginalization of the role of economic doctrine and property rights in the field. Marc Belissa's wide-ranging works of 18th century France include what the *philosophes* (Montesquieu, Voltaire, Diderot, Rousseau) wrote on the foreign policy of the old regime as aspects of the history of the law of nations. In this way, he makes the topic inextricable of the spirit of »les lumières«, peaking in the Declaration of the Rights of man and Citizen of 1789 or the Draft Declaration of the Rights of Nations by the Abbé Grégoire of 1793/95.[70] Situating international law culturally and politically within such texts or debates is heavy with consequences about how we should think about it – as a »European« substance, born out of the experiences of early modern statecraft and French absolutism, part of the liberal ideas of progress through stages of civilization. In this narrative, Immanuel Kant is not only a figure in the history of philosophy but also in the history of the law of nations, guiding the imagination of large publics in Europe to believe in a »universal history with a cosmopolitan purpose« in which Europe »will probably legislate eventually fore all other continents«.[71]

Such »Whig history« forms a great part of traditional writing of international law's past; we recognize our own progressive spirit in the narratives we tell about these eighteenth-century heroes. And yet, why look there? At the very same moment when the *philosophes* were arguing in their salons, French importation of slaves to the Antilles reached its peak so as to arise during 1775–1800 to nearly half a million souls.[72] Though the call for »break the chains of serfdom« was common among the *philosophes*, what they were referring to was ending monarchic absolutism in France, not the freedom for French slaves.[73] In the end, liberation in Saint-Domingue (Haiti) would come only through armed rebellion, the complete destruction of European settlement and the declaration of independence as from 1804. If it took until 1838 for France to recognize such independence, most other states waited much longer so that in his classic three volume textbook of international law of 1904 the first professional historian of international law, Ernest Nys still did not find a place for Haiti among the three non-European, non-American States – namely Liberia, Japan and the Independent State of the Congo.[74] The fact that Nys was also writing »in context« is surely no reason to avoid observing his complicity with colonization and hypocrisy. It is customary to celebrate the ending the slave trade as an achievement of legal humanitarianism. And yet law is all over the organization of the slave trade itself, from the establishment of the Iberian monopoly to the Treaty of Utrecht (1713) whereby the *asiento* was granted to Britain and indeed to the organization of the infamous triangular trade by France whereby slavers coming from the African west coast to the Caribbean would then load sugar, coffee, tobacco and indigo to be brought to the principal ports of Bordeaux, Nantes and Saint-Malo and leave again to Africa with cotton and copper utensils, pots and iron bars, knives and glass trinkets as well as gunpowder, guns and spirits.[75] The indefensible exclusion of the history of the slave trade from the history of the law of nations can

70 See Belissa (1998).
71 Kant (1991) 52.
72 The numbers are from Nimako / Willemsen (2011) 22.
73 See especially Curran (2011).
74 Nys (1904–1906) Vol. I, 118, 126.
75 See Braudel (1992) 438–440.

only be regarded as a purely ideological move by the Belgian Nys and his colleagues in late-19th and early 20th century in an effort to create distance between the field in which they were authorities and from morally suspicious practices such as their warm support to the civilizing mission carried out with international legal endorsement by the 1885 Berlin treaty in the Congo.[76] Although such judgment emanates from the present context, holding this against making it seems an altogether awkward – »scholastic« – irrelevancy.

Finally, there is the problem of *scale*. Histories of international law have tended to encompass large, even global wholes that are supposed to determine the substance of the international laws of a period, such as the »Spanish«, »French«, or »British« »epochs« discussed by Grewe and Ziegler in their influential works. But is such a wide angle really the appropriate context in which to analyse past law or legal culture? What about adopting a narrower perspective by examining the legal thinking in a particular country at a particular moment? Or by choosing an individual – Grotius, say – and examining the immediate environment in which his personal and scholarly career unfolded? These are of course not the only choices to be made. As Martin Jay has queried:

> »[I]s the most potent context something as global as an historical epoch or chronotope? Or is the proper level that of a language, a religion, a class of a nation-state. or do we have to look at more proximate contexts, say the precise social, political or educational institutions in which the historical actor was embedded, the generation to which he or she belonged, or the family out which he or she emerged?«[77]

What would be the appropriate scale in which to examine the work of an individual such as Alberico Gentili? What weight should be given to the fact that he was born in Italy and had studied Roman law in the Bartolist vein? The (large) fact of religion, that he became a Protestant refugee in England, must surely play some role in a contextualization of his works but precisely what? And how important might it be to focus sharply on the Oxford environment, his struggles with his puritan adversaries at a time of the production of his most important texts? Such considerations have often been included in discussions of his achievement and in them, the scale keeps changing from large to small, epochal to personal, geographic to ideological. Clearly, the fact that he was a jurist operating during the »Spanish epoch« might be relevant in understanding his famous appeal for the silence of the theologians in matters of law. Or was that call rather made in an intra-Protestant schism? Is the proper large scale that of »Spanish imperial expansion« – or the struggle against counter-reformation?[78] It seems likely that we can choose the appropriate wide lens only once we have grasped Gentili the individual in a narrow focus, writing in a specific place at a specific moment. But the choice of the place and the moment cannot be uninfluenced by what we know of the general context. And so on. The narrative moves back and forth between a wider and a narrower scale in order to gradually come to a clearer view of its object.

It is an almost unthinking practice of international lawyers today to adopt a global scale, no doubt in part in reaction to the earlier predominance of biographical studies in the field. But my first contact with the subject was through a textbook with the title (in Finnish) »Finland's International Law«.[79] There is an important sense in which the proper scale for a history of international law is that of the nation. After all, some of the best German teaching in the subject in the 18th and 19th centuries regarded it as »external public law« (»*äußeres Staatsrecht*«), a species in the German genus of public law. The scale here is that of the nation's foreign policy as seen from the foreign ministry – the domestic laws and treaty-arrangements that regulate the conduct of external relations. I have elsewhere argued that international law is a specifically »German discipline« and wanted to point to the fact that a history of the subject that failed to adopt the scale of the reorganization of Central Europe (the Holy Roman Empire) would hardly have any sense of the topic at all.[80]

There are of course formidable philosophical difficulties in the opposite choices of scale offered by available alternatives – the wide-angle of »global

76 See Koskenniemi (2002).
77 Jay (2011) 560.
78 See again, Panizza (1981).
79 Castrén (1959).
80 Koskenniemi (2011a).

history«, mid-level »national history« and the limited scope of biography – that have to do with the tools of understanding available to present observers. The vocabularies of political causation that seem needed for the production of wide-angle explanations have to date dominated diplomatic history and the associated »realist« narratives. Here we see empires, large states, powerful statesmen and their jurists as the principal actors of our narratives. Such histories have been challenged as lacking a sociological grasp on what it is that makes empires or state representatives »tick«, how they operate in relationship to other social forces. Justin Rosenberg, Benno Teschke and Ellen Meiksins Wood have each contested the predominance of an exclusively political focus on the international world.[81] What about the role of social classes, and forms of production in the formation of the agents and relationships even at a global scale? Does the »international« at all mark a meaningful whole that we can examine independently of the social or economic forces that seem to account for such important aspects of the way the world has come about? If it is true, as Teschke argues that »[t]he constitution, operation, and transformation of international relations are fundamentally governed by social property relations«,[82] then this must surely occasion a shift of focus in the writing of international legal history as well. It should now discard the distinction between public law and private law so as to bring into view how notions of property and contract, the structures of family law, inheritance and succession as well as the corporate form have developed over time. It is one of the greatest problems of past histories of international law that they have chosen the scale of the state and traced the trajectories of »sovereignty« only – whereas the global network of property relations, thoroughly legalised as these are, would have enabled a much deeper historical penetration. Although social history has now entered the world of international relations, no comparable turn has yet appeared in international law. China Miéville's Marxist account of international legal history is so far the most accomplished effort to take seriously the social determination of aspects of the international political world, including international law, though the jury is still out on the usefulness of the »commodity-form-theory« as the proper explanatory frame.[83] But the scarcity of *legal* debates about this point is disappointing.

To start on this, something might still be said for depicting the history of international law as the history of legal *ideologies*. Despite the attacks suffered by the notion in recent decades, it may still be useful in capturing what jurisprudence has sometimes dealt with in terms the »judge's legal ideology«, the complex of presuppositions about the world typically received through legal training, by the integration in a class and profession of jurists, for our purposes especially international jurists.[84] There are today many accounts of the work and contexts of legal advisors of governments, of officials and activists of international governmental and non-governmental organizations that might allow the delineation of something like the »ideology of competent international lawyers«, a specific »sensibility« that might unite the concerns of the history of legal *thought* with the study of social history. As an example, it seems obvious that the relative absence of debates on *ius gentium* in Britain until mid-19th century was occasioned at least in part by the specific outlook of English jurists predisposed to view the world through a combination of commercial laws and the crown's imperial prerogatives to which the absence of adoption of Roman law added something. In the absence of other vocabulary for addressing the specificity of the outlook of English jurists, product of a complex contextualization, the notion of »ideology« might usefully contrast their world to that of the universities of Prussia-Brandenburg at a time when central European statecraft began to cope with the challenges of what appeared an increasingly autonomous sphere of »the economy«. Here »ideology« and «sensibility« would become meeting-points for history of thought and social causation, just flexible or porous enough to account for both punctual and differential history, the formation of shared meanings in a loosely defined cultural and professional context that would also be amenable to change induced by external forces.

81 Rosenberg (1994); Wood (2008) and its continuing volume Wood (2012); Teschke (2003).

82 Teschke (2003) 273.

83 Miéville (2005), especially 155 et seq.

84 See Ross (1958) 76 et seq.

V. Vitoria and Us: Continuity and Difference

The turn to contextual readings of international legal texts and environment-sensitive narratives of the lives and activities of particular jurists marked a welcome advance from the older search of origins to present law and the progressive accounting of international doctrines that went with it. The point about the »modernity« Vitoria can no longer be taken seriously as a statement in legal history – even as it may say much about the context and ideological position of the one who makes it. Nevertheless, there was something valuable in the sweeping normativity of those older works. The first historians of international law, Nys, Redslob, Vinogradoff and Scott wrote as committed participants in an institution-building project within the League of Nations and the consolidation of a »modern« international world. That their recounting of Vitoria as a precursor of their own project was in many ways flawed, even naïve, was rapidly pointed out by the new realists in the 1950s, Grewe, Schmitt, Nussbaum, among other committed participants of another postwar project. It was mostly in the Catholic world, more especially in Spain, where originalist readings of Vitoria have remained current in the post-war years, often as part of a morally toned opposition to the spread of secular, economically driven global modernity. It is hard not to see the contacts between that conservative agenda and the postcolonial critique of globalization: the fascination with Schmitt on both sides testifies to this. The contextual histories produced by Annabel Brett, Ian Hunter, Anthony Pagden, Richard Tuck, and others are welcome in counteracting simple or simplistic uses of Vitoria as part of such agendas. Yet, they would undoubtedly agree that attention of a *critical* historian of international law cannot be limited to the careful reconstruction of the contexts in which Vitoria worked but must also examine how those contexts were formed and to what extent they have persisted to make international law what it has become today. Brett's *Changes of State*, for example, moves almost invisibly from a complex contextualization of the ways in which the limits of the political community were imagined in early modernity to a critique of how those imaginary lines are drawn and bind us in the present.[85]

There is much reason to continue reflecting about the relations pertaining between Vitoria and ourselves. In composing narratives about the Dominican cleric historians will continue to contextualise him in ways that are different because the questions they pose continue to differ. The historian does not occupy a universal standpoint. But irrespectively of that self-evident fact, readers of histories will continue to be influenced. They will learn about the plight of an intellectual, pressed by the demands of power, faith and the wish to integrity – pressures not alien to today's academics. They will find out how »law« receives its field of authority from adjoining disciplines through the contingent demarcations that have taken place between it and theology, politics, economics, and technology and that are reproduced in daily operations of today's institutions. When they shift the scope of their vision from individuals and their institutions to the wider world, they will learn about how law participates as a supporter or critic of military operations, about state-building, about imperial ambitions and about the virtues and vices of missions to civilize. In this process they may come to think of as strange and problematic that which earlier seemed unthinkingly familiar – the fact, for example, that massive poverty in the world can be upheld by theological respect to the right of property whose contours have nevertheless varied sharply across contexts. They may also come to find out that neither »inclusion« not »exclusion« appears as a prima facie beneficial basis on which to move about in the world but that every relationship has its specific nature and history, and that even as patterns and paradigms do form, they never account for the full sphere of future possibilities.

Which leads me to my final point. The reduction of a text or an action to the context is relative to the way the historian frames the context, decides its scope and chooses its scale. But there is a larger question about that reduction. History is not just contexts, miraculously collapsing into each other. In order to account for change legal history must accept that however thick a description of a context it has achieved, it is never such that it exhausts all future possibility. It is also part of the critical legal

85 Brett (2011).

acquis to focus away from the manner contexts reproduce themselves and their accompanying structures of economic, technological, political and symbolic domination. This means directing attention to special context-breaking moments, practices that transform what was earlier taken for granted, as well as the accompanying hierarchies.[86] To some extent, this builds on the larger tradition of writing about great »events« that can be contrasted with the monotonous routines through which the context merely keeps reproducing itself.[87] Such events often draw upon the porosity of the boundaries of a context and may contribute to processes that lead to the transformation of the context itself – an »epoch« turns into another, a realist historian might later come to write. In their preface to a recent work on »events« in international law, the editors highlight precisely the opportunities opened by moments or activities that raise against the gray normality of routine applications of the law and instead move the law forward, contribute to crystallizing a substance or a content that seem »›startlingly inconsistent‹ with what had come before«.[88] Such events, rare as they are, cannot be reduced to the context, even as one must be wary of an international law in which »reform« has tended to operate precisely like this.[89] Stereotypical context-breaking »events« in the political world are of course great revolutions – the French and the October revolutions, but perhaps also »1989« and Arab Spring (who knows, it is an aspect of the »event« that it is difficult to identify it as such when it occurs – however much it might call for our »fidelity« when it does).[90]

The »discovery« of the new world certainly was an »event« of this type, but so was getting rid of the prohibition of usury – colonialism and commercial expansion both being parts of the world in which Vitoria operated and to which he gave intellectual articulation. Using old materials in innovative ways he opened possibilities or thinking and acting for his contemporaries that were not visible earlier, at least not in the same way. Attention to such context-breaking events, or moments where the new is being articulated for the first time, is surely as necessary as attention to the ways in which contexts and their articulations keep reproducing themselves – the way for example Vitoria kept his teaching strictly within the confines of religious training. Together they provide accounts of punctual time and differential time and give historical sense to the political predicament that even as we are today bound by our contexts, not everything about our thinking and acting is determined by them, and that there may thus arise moments where what we do becomes part of an event that finally changes the context. There can hardly be better reasons for engaging in critical legal history than endorsing a live sense of that possibility.

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Bibliography

- Allott, Philip (1990), Eunomia. New Order for a New World, Oxford: Oxford University Press
- Allott, Philip (2002), The Health of Nations. Society and Law beyond the State, Cambridge: Cambridge University Press http://dx.doi.org/10.1017/CBO9780511493676
- Anghie, Antony (2003), Imperialism, Sovereignty and the Making of International Law, Cambridge: Cambridge University Press
- Badiou, Alain (2001), Ethics. An Essay on the Understanding of Evil, London: Verso
- Bandeira Galindo, George (2012), Force Field: On History and Theory of International law, in: Rechtsgeschichte 20, 86–103
- Barreto, José-Manuel (2013), Imperialism and Decolonization as Scenarios of Human Rights History, in: Barreto, José-Manuel (ed.), Human Rights from a Third World Perspective, Newcastle upon Tyne: Cambridge Scholars Publishing, 140–171
- Belissa, Marc (1998), Fraternité universelle et intérêt national (1713–1795). Les cosmopolitiques du droit des gens, Paris: Kimé

86 See Unger (1987) and Koskenniemi (2005a) 548–561.
87 See also Jay (2011) 564–568.
88 Johns / Joyce / Pahuja (2011) 2.
89 See Kennedy (2000).
90 The idea of »fidelity« to an event is an important part of the political thought of Badiou. See e. g. Badiou (2001) 40–44.

- Benjamin, Walter (1968), Theses on the Philosophy of History, in: Arendt, Hannah (ed.), Illuminations. Essays and Reflections, New York: Schocken, 253–264
- Bevir, Mark (1999), The Logic of the History of Ideas, Cambridge: Cambridge University Press
- Braudel, Fernand (1992), Civilization and Capitalism, 15th – 18th Century. Vol III: The Perspective of the World, Berkeley, Calif.: California University Press
- Brett, Annabel (2011), Changes of State. Nature and the Limits of the City in Early Modern Natural Law, Princeton, NJ: Princeton University Press
- Castrén, Erik (1959), Suomen kansainvälinen oikeus, Porvoo: WSOY
- Cavallar, Georg (2008), Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?, in: Journal of the History of International Law 10, 181–209 http://dx.doi.org/10.1017/CBO9780511493676
- Certeau, Michel de (1988), The Writing of History, transl. by T. Conley, New York: Columbia University Press
- Chakrabarty, Dipesh (2000), Provincializing Europe. Postcolonial Thought and Historical Difference, Princeton NJ: Princeton University Press
- Craven, Matthew (2013), The Invention of a Tradition: Westlake, the Berlin Conference and the »Historicisation« of International Law, in: Nuzzo, Luigi, Miloš Vec (eds.), Constructing International Law. The Birth of a Discipline, Frankfurt: Klostermann, 363–402
- Curran, Andrew S. (2011), The Anatomy of Blackness. Science and Slavery in the Age of the Enlightenment, Baltimore: Johns Hopkins University Press
- Dassel, Enrique (2013), Las Casas, Vitoria, and Suárez 1514–1617, in: Barreto, José-Manuel (ed.), Human Rights from a Third World Perspective. Critique, History and International Law, Newcastle upon Tyne: Cambridge Scholars, 172–207
- Domingo, Rafael (2010), The New Global Law, Cambridge: Cambridge University Press http://dx.doi.org/10.1017/CBO9780511711916
- Forcada Barona, Ignacio (2012), La influencia de la religión católica en la doctrina internacionalista española del período de entreguerras (1918–1939), in: Gamarra / De la Rasilla (eds.) (2012) 229–286
- Gadamer, Hans-Georg (1977), Philosophical Hermeneutics, transl. & ed. by D.E. Linge, Berkeley: University of California Press
- Gamarra, Yolanda, Ignacio de la Rasilla (eds.) (2012), Historia del pensamiento iusinternacionalista español del siglo XX, Vol. I: En el umbral del 36, Cizur Menor, Navarra: Arazandi
- Gordon, Peter E. (2014), Contextualism and Criticism in the History of Ideas, in: McMahon / Moyn (eds.) (2014) 32–55
- Grewe, Wilhelm (2000), The Epochs of International Law, Berlin: De Gruyter http://dx.doi.org/10.1515/9783110902907
- Gundling, Nicolaus Hieronymus (1747), Ausführlicher Discours über die Natur- und Völcker-Recht, 2nd ed., Frankfurt & Leipzig: Spring
- Gundling, Nikolaus Hieronymus (1757), Erörterung der Frage: Ob wegen der anwachsenden Macht der Nachbarn man den Degen entblößen könne?, Frankfurt, Leipzig
- Hamilton-Blakeley, Holly (2006), Linguistic Philosophy and the Foundations, in: Brett, Annabel, James Tully, Holly Hamilton-Blakeley, Rethinking the Foundations of Modern Political Thought, Cambridge: Cambridge University Press, 20–33
- Hammerstein, Notker (1972), Ius und Historie. Ein Beitrag zur Geschichte des historischen Denkens an deutchen Universitäten im späten 17. und im 18. Jahrhundert, Göttingen: Vandenhoeck & Ruprecht
- Hueck, Ingo J. (2001), The Discipline of the History of International Law. New Trends and Methods in the History of International Law, in: Journal of the History of International Law 3, 194–217
- Hunter, Ian (2010a), Global Justice and Regional Metaphysics. On the Critical History of the Law of Nature and Nations, in: Dorsett, Shaunnagh, Ian Hunter (eds.), Law and Politics in British Colonial Thought. Transpositions of Empire, New York: Palgrave, 11–29
- Hunter, Ian (2010b), Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation, in: Grotiana 31, 108–140
- Jay, Martin (2011), Historical Explanation and the Event: Reflections on the on the Limits of Contextualization, in: New Literary History 42, 557–571 http://dx.doi.org/10.1353/nlh.2011.0043
- Johns, Fleur, Richard Joyce, Sundhya Pahuja (2011), Introduction, in: Events: The Force of International Law, New York: Routledge, 1–18
- Jouannet, Emmanuelle (2011), Le droit international liberal-providence. Une histoire du droit international, Brussels: Bruylant
- Jouannet, Emmanuelle, Hélène Ruiz-Fabri (2007), Impérialisme et droit international en Europe et aux États-Unis, Paris: Société de legislation comparée
- Kant, Immanuel (1991), Idea for a Universal history with a Cosmopolitan Purpose, in: Political Writings, ed. by Hans Reiss, Cambridge: Cambridge University Press, 41–53
- Kennedy, David (2000), When Renewal Repeats. Thinking against the Box, in: New York University journal of international law and politics 32, 335–500
- Kent-Wright, Johnson (1997), A Classical Republican in Eighteenth-Century France. The Political Thought of Mably, Stanford, Calif.: Stanford University Press
- Kingsbury, Benedict, Benjamin Straumann (eds.) (2010), The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire, Oxford: Oxford University Press http://dx.doi.org/10.1093/acprof:oso/9780199599875.001.0001
- Koselleck, Reinhart (1979), Futures Past. On The Semantics of Historical Time, New York: Columbia University Press
- Koselleck, Reinhart (2002), The Practice of Conceptual History. Timing History, Spacing Concepts, Stanford, Calif.: Stanford University Press

- Koskenniemi, Martti (2002), The Gentle Civilizer of Nations. The Rise and Fall of International law 1870–1960, Cambridge: Cambridge University Press
- Koskenniemi, Martti (2005a), From Apology to Utopia. The Structure of International law Argument. Reissue with a New Epilogue, Cambridge: Cambridge University Press
- Koskenniemi, Martti (2005b), International Law in Europe: Between Tradition and Renewal, in: European Journal of International Law 16,1 113–124
- Koskenniemi, Martti (2011a), Between Coordination and Constitution: International Law as a German Discipline, in: Redescriptions. Yearbook of Political Thought and Conceptual History 15, 45–70
- Koskenniemi, Martti (2011b), Histories of International Law: Dealing with Eurocentrism, in: Rechtsgeschichte 19, 152–176
- Koskenniemi, Martti (2011c), The Political Theology of Trade Law: the Scholastic Contribution, in: Fastenrath, Ulrich et al. (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma, Oxford: Oxford University Press, 90–112
- Koskenniemi, Martti (2012a), Ius Gentium and the Birth of Modernity, in: Nuzzo / Vec (2012) 3–23
- Koskenniemi, Martti (2012b), Law, Teleology and International Relations: An Essay in Counter-disciplinarity, in: International Relations 26, 3–34
- Koskenniemi, Martti (2013), A History of International Legal Histories, in: Fassbender, Bardo, Anne Peters (eds.) (2013), The Oxford Handbook of the History of International Law, Oxford: Oxford University Press, 943–971
- Koskenniemi, Martti (forthcoming), Rights, History, Critique, in: Etinson, Adam (ed.), Human Rights: Moral or Political?, Oxford: Oxford University Press
- Laurent, François (1851–1870), Histoire du droit des gens et des relations internationales, 18 Volumes, Paris: Durand
- Lazzeri, Christian (1995), Introduction, in: Rohan, H. de, De l'intérêt des princes et des États de la chrétienté, Paris: PUF, 1–156
- Lejbowicz, Agnès (1979), La philosophie de droit international, Paris: PUF
- Lovejoy, Arthur S. (1936), The Great Chain of Being. A Study of the History of an Idea, Cambridge, Mass.: Harvard University Press
- McMahon, Darrin M., Samuel Moyn (eds.) (2014), Rethinking Modern European Intellectual History, Oxford: Oxford University Press
- Miéville, China (2005), Between Equal Rights. A Marxist Theory of International Law, Leiden: Brill
- Moyn, Samuel (2010), The Last Utopia. Human Rights in History, Cambridge, Mass.: Harvard University Press
- Moyn, Samuel (2012), Substance, Scale and Salience. The Recent Historiography of Human Rights, in: Annual Review of Law and Social Science 8, 123–140 http://dx.doi.org/10.1146/annurev-lawsocsci-102811-173847
- Moyn, Samuel (2014), Imaginary Intellectual History, in: McMahon / Moyn (eds.) (2014) 112–130
- Nimako, Kwame, Glenn Willemsen (2011), The Dutch Atlantic. Slavery, Abolition and Emancipation, London: Pluto Press
- Nussbaum, Arthur (1954), A Concise History of the Law of Nations, 2nd ed., New York: Macmillan
- Nuzzo, Luigi (2004), Il linguaggio giuridico della conquista. Strategie di controllo nelle Indie spagnole, Napoli: Jovene
- Nys, Ernest (1894), Les origines du droit international, Brussels: Castaigne
- Nys, Ernest (1904–1906), Le droit international, les principes, les theories, les faits, Brussels: Castaigne
- Orford, Anne (2013), On International Legal Method, in: London Review of International Law 1,1 166–197
- Orford, Anne (forthcoming), The Past as Law or History? The Relevance of Imperialism for Modern International law, in Jouannet, Emmanuelle, Hélène Ruiz-Fabri (eds.), Tiers-Monde: Bilan et perspectifs, Paris: Société de Législation Comparée
- Pahuja, Sundhya (2011), Decolonising International Law, Cambridge: Cambridge University Press http://dx.doi.org/10.1017/CBO9781139048200
- Panizza, Diego (1981), Alberico Gentili, giurista ideologo nell'Inghilterra elisabettiana, Padova: La Garangola
- Pastor Ridruejo, José Antonio (2012), Francisco de Vitoria y la modernidad de sus enseñanzas: »Ius ad Bellum« y »Ius in Bello«, in: Gamarra / De la Rasilla (eds.) (2012) 79–88
- Rasilla del Moral, Ignacio de la (2012a),The Fascist Mimesis of Spanish International Law and its Vitorian Aftermath, 1939–1953, in: Journal of the History of International Law 14, 207–236
- Rasilla del Moral, Ignacio de la (2012b), The Zero Years of Spanish International Law 1939–1953, in: Jouannet, Emmanuelle, Iulia Motoc (eds.), Les doctrines internationalistes durant les années du communisme réel en Europe, Paris: Société de Législation Comparée, 237–276
- Redslob, Bobert (1923), Histoire des grands principes du droit des gens depuis l'Antiquité jusqu'à la veille de la grande guerre, Paris: Rousseau
- Rosenberg, Justin (1994), The Empire of Civil Society, London: Verso
- Ross, Alf (1958), On Law and Justice, Berkeley: University of California Press
- Rossi, Christopher (1998), Broken Chain of Being: James Brown Scott and the Origins of Modern international law, The Hague: Kluwer
- Saada, Julie, Mikhail Xifarras (forthcoming), Le droit, entre théorie et critique, Paris
- Schmitt, Carl (1950), Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum, Berlin: Duncker & Humblot
- Scott, James Brown (1928), The Spanish Origins of International law: Lectures on Francisco de Vitoria (1480–1546) and Francisco Suárez (1548–1617), Washington: Georgetown University
- Skinner, Quentin (2002), Meaning and Understanding in the History of Ideas, in: Visions of Politics, 3 Vols., Cambridge: Cambridge University Press, vol. I, 57–89 http://dx.doi.org/10.1017/CCOL0521581052.004
- Teschke, Benno (2003), The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations, London: Verso
- Thomasius, Christian (1718), Fundamenta juris naturae et gentium ex sensu communi deducta (4th ed. Saalfeld)

- Thuo Gathii, James (2010), War, Commerce and International Law, Oxford: Oxford University Press
- Tomlins, Christopher (2012), After Critical Legal History: Scope, Scale, Structure, in: Annual Review of Law and Social Science 8, 31–68 http://dx.doi.org/10.1146/annurev-lawsocsci-102811-173811
- Tuck, Richard (1993), Philosophy and Government 1572–1651, Cambridge: Cambridge University Press http://dx.doi.org/10.1017/CBO9780511558634
- Unger, Roberto (1987), Social Theory. Its Situation and its Task. A Critical Introduction to Politics, a Work in Constructive Social Theory, Cambridge: Cambridge University Press
- Van Ittersum, Martine (2006), Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615), Leiden: Brill
- Vattel, Emer de (2008), The Law of Nations [1758], Indianapolis: Liberty Fund
- Villey, Michel (1983), Le droit et les droits de l'homme, Paris: PUF
- Vinogradoff, Paul (1923), Historical Types of International Law, Bibliotheca Visseriana 1, Leiden: Brill
- Vitoria, Francisco de (1991), On Civil Power, in: Political Writings, ed. by A. Pagden and J. Lawrance, Cambridge: Cambridge University Press, 1–44
- Waldron, Jeremy (2012), »Partly Laws Common to all Mankind«. Foreign Laws in American Courts, New Haven: Yale University Press
- Williams, Robert A. (1990), The American Indian in Western Legal Thought. The Discourses of Conquest, Oxford: Oxford University Press
- Wilson, Eric (2008), Savage Republic. De Indis of Hugo Grotius, Republicanism and Dutch hegemony within the Early Modern World-System (c. 1600–1619), Leiden: Nijhoff http://dx.doi.org/10.1163/ej.9789004167889.i-534
- Wood, Ellen Meiksins (2008), Citizens to Lords. A Social History of Western Political Thought From Antiquity to the Middle Ages, London: Verso
- Wood, Ellen Meiksins (2012), Liberty and Property. A Social History of Western Political Thought From Renaissance to Enlightenment, London: Verso
- Zapatero, Pablo (2009), Legal Imagination in Vitoria. The Power of Ideas, in: Journal of the History of International Law 11, 221–271 http://dx.doi.org/10.1163/138819909X12468857001424
- Ziegler, Karl-Heinz (1994), Völkerrechtsgeschichte, Munich: Beck